IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1948~~ 1949

JULIA RHODA AARON ET AL. ..... *Petitioners,*

v. No. ~~999~~ 77

FORD, BACON & DAVIS, INC. ..... *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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STATUTES:

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OPINIONS BELOW

The judgment of the United States District Court for the Eastern District of Arkansas (R. 56-58) adopted the opinion filed by the same court in the case of *Barksdale* v. *Ford, Bacon & Davis, Inc.*, 70 F. Supp. 690 (R. 58-79). The opinion of the United States Court of Appeals for the Eighth Circuit (App. R. 7-33) is reported at ..... F. (2) .....

JURISDICTION

The jurisdiction of this court is invoked under Title 28 U.S.C.A. 347(a) (see Petition for Certiorari, page 3). This is Section 240 of the Judicial Code, as amended. This section has been superseded by the revised Judicial Code; Ch. 646, Pub. L. 773, 80th Cong., 2nd Sess. (June 25, 1948). Jurisdiction should have been invoked under Section 1254 of the new Code (28 U.S.C. 1254).

STATEMENT OF THE CASE

Respondent deems the statement of petitioners insufficient. In referring to the record in this brief reference to the original record filed by petitioners in the Court of Appeals is as follows: "R. ....". Reference to the supplemental record filed by respondent in the Court of Appeals is as follows: "S. R. ....". Reference to that part of the record containing the proceedings had in the Court of Appeals will be as follows: "App. R. ....".

The petitioners, plaintiffs below, approximately 1,800 in number, filed seven separate actions against the respondent, defendant below, seeking additional compensation alleged to be due under the Fair Labor Standards Act. By stipulation, the pleadings in one action only have been included in the record.

Plaintiffs allege (R. 3-13) that they were employed at the Arkansas Ordnance Plant at Jacksonville, Arkansas, for varying periods of time, and they seek additional pay alleged to have accrued during their respective periods of employment for what appear to have been primarily portal to portal activities.

In Paragraph IV of the complaint (R. 4) plaintiffs set forth the distances from the main gate of the plant to the various work areas, and allege that employees at the plant were under defendant's control upon passing through the main gate because the defendant, among other things, would not permit them to use motorcycles, bicycles, scooters, horses, carriages, or skates as a means of transportation, and concluded that such travel time was necessary to the production aims of defendant and for its benefit, and, therefore, compensable (R. 7, 8). Other preliminary and postliminary activities were described in the complaint, and plaintiffs requested access to the time clock records maintained at the plant to determine the exact amount of time spent on the premises of the Ordnance Plant (R. 5-12).

Plaintiffs contend the Fair Labor Standards Act is applicable, alleging in Paragraph III of the complaint (R. 4) "that the defendant * * * controlled, maintained, and operated the Arkansas Ordnance Plant, wherein goods for commerce were produced", and in Paragraph IV (R. 4)

that plaintiffs were engaged in the production of goods for commerce. They do not allege that they were "engaged in commerce".

The defendant answered, denying generally the allegations in the complaint, denying specifically that the Fair Labor Standards Act was applicable to plaintiffs' employment, denying that plaintiffs were engaged in the production of goods for commerce; alleging that defendant was the agent of the Government with respect to the employment of plaintiffs and that therefore the Government was the employer and the Fair Labor Standards Act inapplicable, pleading accord and satisfaction; alleging that the activities for which plaintiffs seek compensation are not compensable by contract or custom, that plaintiffs were paid in accordance with regulations, orders, rulings, and approvals of the Ordnance Department, an agency of the United States, and that, therefore, the claims were not compensable by virtue of the Portal-to-Portal Act of 1947 (R. 13-16).

Thereafter, the defendant moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The motion was based upon the ground of inapplicability of the Fair Labor Standards Act. It specifically alleged (a) that plaintiffs were not engaged in commerce or in the production of goods for commerce; (b) that plaintiffs were employees of the United States, and, therefore, exempt from coverage under the Fair Labor Standards Act; and (c) that plaintiffs' claims were barred under the provisions of the Portal-to-Portal Act of 1947 (S. R. 1). Attached to the motion were four affidavits and numerous exhibits (S. R. 2-124).

A response, containing affidavits in opposition to the motion, was filed by the plaintiffs (R. 41), but at the hearing in the trial court plaintiffs' counsel stipulated that the affidavits in opposition raised no controverted questions of fact (R. 2). For the purposes of this case, the matters of fact set forth in the affidavits and exhibits attached to the motion for summary judgment are undisputed.

Also before the District Court at the time of the hearing on the motion for summary judgment were the request

of plaintiffs for admissions of fact and responses thereto (S. R. 124-135) and interrogatories propounded by plaintiffs and responses thereto (S. R. 136-170). The matters of fact set forth in these pleadings also were undisputed. A brief summary of the facts disclosed by the undisputed pleadings before the court follows:

The United States, acting through the War Department, entered into a contract with Ford, Bacon & Davis, Inc., for the construction and operation of the Arkansas Ordnance Plant, at Jacksonville, Arkansas (S. R. 21-73). This contract was authorized by the Act of July 2, 1940 (Public Law No. 703, 76th Congress, U.S.C.A. Title 50, App. Sec. 1171) (S. R. 22) which provides in part that the Secretary of War is authorized to provide for the operation of plants "either by means of Government personnel or through the *agency* of selected qualified commercial manufacturers under contracts entered into with them".

The plant was constructed pursuant to the terms of the contract, and the Government then exercised its option to have the contractor operate the plant. The plant and all facilities therein were the property of the Government (S. R. 9, 14). By express contract provision the title to all work completed or in the course of construction, preparation, or manufacture was in the Government (see Contract, Art. VII-D, S. R. 63).

The Government furnished directly in excess of 90% of all materials used at the plant (S. R. 11). The Government took title to all property acquired through the facilities of Ford, Bacon & Davis, Inc., at its point of origin (S. R. 4). A commanding officer was always on duty at the plant and had supervision and control of the entire area (S. R. 12). The Government retained the right to approve or disapprove the hiring or firing of any employee (S. R. 12, 16). Salaries and wages were required to be approved by the Government (S. R. 18). The Government paid all freight bills direct, and paid telegraph, teletype, and electric bills direct (S. R. 8, 9, 13). Practically all property shipped into the plant was shipped on Government bills of lading, or, if commercial bills of lading were used, they were converted to Government bills of lading (S. R. 4).

The Government furnished all money disbursed by the contractor (S. R. 3). Ford, Bacon & Davis, Inc., had no investment whatever in the plant or in the operation thereof (S. R. 10). The Government specified the items to be produced and issued detailed instructions as to the method of production (S. R. 4, 20). The Government maintained inspectors and supervisors to observe and check on each step in the manufacture of munitions. The contractor had no discretion in the method of manufacture. Not only was it required to produce an item of certain specifications—it was required to do so in a certain, specified manner (S. R. 20).

The contractor did not sell munitions to the Government or to any other party (S. R. 16). It recruited the labor and furnished the management for the processing of Government property, as instructed from time to time by the Government. If defective munitions were produced the loss was borne by the Government and not by the contractor (Contract, Art. V-A, 1, S. R. 48). The contractor risked no capital in this enterprise (S. R. 8, 10). The Government paid all costs of every kind. For its services the contractor received a fixed fee which was not dependent in any way upon the amount of munitions produced (Contract, Art. IV-C, S. R. 42).

Prior to the time that the plaintiffs in this suit were employed the Government approved a list of job classifications setting forth the wages to be paid in each classification (S. R. 18). The defendant was required to comply with these schedules, and before any wages were paid the Government audited the pay rolls to determine their compliance with instructions.

When processing was complete the munitions either were stored in Government warehouses or were loaded into freight cars on the plant premises. The munitions were then shipped by the Government on Government bills of lading to military establishments either within the United States or overseas (S. R. 3).

The Government designated which employees should be paid for work over forty hours a week and which should not (S. R. 18). The Government maintained independent checkers at the clock houses (S. R. 14), it determined when

and to what extent overtime should be paid, and Government auditors approved all time cards before payment was made (S. R. 14). The contractor was not permitted to deviate from the Government pay policies (S. R. 18). No wage or salary payments were made except upon specific approval of the Government (S. R. 18).

The correspondence set forth in Exhibit 5 to the motion for summary judgment (S. R. 90-97) indicates the close supervision over wage payments maintained by the Government. In that instance, although the contractor was experiencing difficulty in employing janitors at the rate previously fixed by the Government, the Government refused to permit an increase in the wage rate.

Upon the uncontradicted evidence before it the district judge concluded that plaintiffs could not recover under the Fair Labor Standards Act, and the motion for summary judgment was granted (R. 56). The district judge previously had presided at the trial of a similar case (Barksdale v. Ford, Bacon & Davis, Inc., 70 F. Supp. 690) on the merits, and he adopted his opinion in that case, in so far at it was applicable to the present controversy (R. 57).

Upon appeal to the United States Court of Appeals for the Eighth Circuit, the case was submitted to a court of three judges. Later, after the opinion in Kennedy v. Silas Mason Company, 334 U. S. 249, the court set aside the previous submission, and the cause was set for reargument before the court *en banc*. The Court of Appeals affirmed the judgment of the trial court, though on different grounds, and the plaintiffs now seek a writ of certiorari.

QUESTIONS PRESENTED

The primary question presented is whether the courts below erred in holding that the plaintiffs were entitled to no relief under the provisions of the Fair Labor Standards Act.

Subsidiary issues relate to the reasons assigned for nonapplicability of the Fair Labor Standards Act. These involve the questions (1) whether, as the Court of Appeals held, some other act of Congress defines the rights of the plaintiffs to the exclusion of the Fair Labor Standards Act;

(2) whether, as the district court held, plaintiffs were not engaged in the production of goods for commerce and, thus, by its terms, the Fair Labor Standards Act is inapplicable; (3) whether the plaintiffs were in the employ of the United States, as this court held in the United Mine Workers case (330 U. S. 258) and, therefore, exempted by express provision of the act; (4) whether the materials worked on by the plaintiffs were "goods" as defined in the Fair Labor Standards Act; and (5) whether, in view of the Portal-to-Portal Act of 1947, the plaintiffs may recover in any event.

STATUTES INVOLVED

The pertinent portions of the Fair Labor Standards Act[1] follow:

"§ 203. Definitions

"As used in Sections 201-219 of this title—

* * *

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

* * *

"(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, *but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.*"

"§ 207.

"(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

[1] Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U.S.C.A. 201-219.

* * *

"(3) for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

"§ 216.

"(b) Any employer who violates the provisions of * * * Section 207 of this title shall be liable to the employee or employees affected in the amount of * * * their unpaid overtime compensation * * * and in an additional equal amount as liquidated damages. * * * The court in such action shall * * * allow a reasonable attorney's fee to be paid by the defendant * * *."

Pertinent provisions of the Walsh-Healey Public Contracts Act [2] follow:

"§ 1.

"In any contract made and entered into by any executive department * * * or other agency or instrumentality of the United States * * *) for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000 there shall be included the following representations and stipulations:

* * *

"(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid * * * not less than the minimum wages as determined by the Secretary of Labor.

* * *

"(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of 40 hours in any one week:

[2] Act of June 30, 1936, c. 881, 49 Stat. 2036, 41 U.S.C.A. 35-45.

* * *

"§ 6.

" * * * Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected: Provided that whenever in his judgment such course is in the public interest the President is authorized to suspend any or all of the representations and stipulations contained in Section 35 of this title."

Pertinent provisions of the Act of July 2, 1940,[3] follow:

"(a) In order to expedite the building up of the national defense, the Secretary of War is authorized, * * * with or without advertising, (1) to provide for the necessary construction * * * of plants * * * for the development, manufacture, maintenance, and storage of military equipment, munitions, etc., * * * (2) to provide for the * * * manufacture * * * of * * * munitions * * * *under such conditions as he may deem necessary*, and (3) to enter into such contracts * * * *as he may deem necessary* to carry out the purposes specified in this section * * * Provided further, that no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled 'An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes,' approved June 30, 1936 (49 Stat. 2036; 41 U.S.C., Secs. 35-45), shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section * * *.

"(b) The Secretary of War is further authorized, with or without advertising, to provide for the operation and maintenance of any plants * * * constructed pursuant to the authorization contained in this section and Section 5, either by means of Government personnel or *through the agency of selected* qualified commercial manufacturers under contracts entered into with

[3] 54 Stat. 712, 50 U.S.C.A. App. 1171.

them, and when he deems it necessary in the interest of national defense, to lease, sell, or otherwise dispose of, any such plants, * * * *under such terms and conditions as he may deem advisable.*"

Pertinent provisions of the Portal-to-Portal Act of 1947[4] follow:

"§ 251. Congressional findings and declaration of policy. (a) The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, * * * (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

"§ 252. (a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after May 14, 1947), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to May 14, 1947, except an activity which was compensable by either—(1) an express provision of a written or nonwritten contract

[4] Act of May 14, 1947, c. 52, 61 Stat. 84, 29 U.S.C.A. 251-262.

in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or (2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

"(b) For the purpose of subsection (a) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

"(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

"(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after May 14, 1947, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section."

"§ 258. In any action or proceeding commenced prior to or on or after May 14, 1947, based on any act or omission prior to May 14, 1947, no employer shall

be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect."

ARGUMENT

PLAINTIFFS ARE ENTITLED TO NO RELIEF UNDER THE FAIR LABOR STANDARDS ACT.

The complaint prays relief under the Fair Labor Standards Act (R. 4, 12). Plaintiffs do not purport to state a cause of action on any other ground. Therefore, if the Fair Labor Standards Act does not support the claim, the complaint was properly dismissed by the lower courts. It matters not whether plaintiffs could have stated a cause of action under the Walsh-Healey Act, the Act of July 2, 1940, or some other federal or state law, or even an action on contract. The question is whether they are entitled to relief on the claim as asserted in the complaint.

This Court, in *Kennedy* v. *Silas Mason Company*,[3] reversed a judgment for the defendant rendered pursuant to motion under Rule 56 of the Rules of Civil Procedure on the ground that, as a matter of good judicial administration, the Court should not attempt to decide the issues because the facts were insufficiently developed.

The facts in the case at bar are fully developed. The plaintiffs have stipulated that the facts set forth in the affidavits supporting the motion for summary judgment are not disputed (R. 2). A trial on the merits could have disclosed no additional facts helpful to a decision of the issues involved on the appeal.

A large number of cases by employees at the Arkansas Ordnance Plant are on file in the United States District Court at Little Rock. Prior to the submission of the Motion for Summary Judgment to the District Court in this case, the District Court had tried a number of these cases on their merits. In each instance, with one exception, judgment was rendered for the defendant on findings of fact on the merits by the judge, or on verdict of the jury. The exception was the case of *Barksdale* v. *Ford, Bacon & Davis, Inc.*[4] In that case, the parties stipulated that the plaintiff was entitled to a judgment if his claim fell within the provisions of the Fair Labor Standards Act. Evidence relat-

[3] 334 U. S. 249; 92 L. Ed. 1347 (1948).
[4] 70 F. Supp. 690 (E. D. Ark. 1947).

ing to this issue was introduced, after which the Court made findings of fact and delivered an opinion holding that plaintiff had no cause of action under the Act. No appeal was taken from the judgment entered thereon. The trial court spent many weeks in the trial of cases by employees at the Arkansas Ordnance Plant. It appeared that if all cases had to be tried on their merits, the Court might be occupied exclusively with such trials for many months. As pointed out in the Barksdale case, the Court was of the opinion that there was no liability under the Fair Labor Standards Act. No case was pending in either the Eighth Circuit or in this Court that would determine the legal issues of liability. It was then that the summary judgment procedure was invoked in an effort to obtain a speedy and expeditious determination of the cases. The affidavits in support of the motion for summary judgment set forth substantially the same facts as were presented to the District Court by testimony of witnesses in the Barksdale case. The affiants had testified in the Barksdale case. By stipulating that these facts were not controverted (R. 2), the plaintiffs have admitted that they are correct. It is submitted that the policy which dictated the decision in the Kennedy case[7] is not applicable to the case presented here and that the trial court and the Court of Appeals were fully justified in deciding the issues involved.

A. THE FAIR LABOR STANDARDS ACT IS NOT APPLICABLE TO THE EMPLOYMENT OF THE PLAINTIFFS.

The Act of July 2, 1940,[8] is the statutory authority for the construction of Government munitions plants and their operation by private contractors. The Secretary of War is granted broad powers in this regard. He was authorized to lease or sell such plants to private manufacturers, to operate the plants by means of Government personnel, or to operate the plants "through the agency of selected qualified commercial manufacturers under contracts entered into with them." In the case of the Arkansas Ordnance Plant, which was constructed and operated pursuant to the

[7] 334 U. S. 249; 92 L. Ed. 1347 (1948).
[8] 54 Stat. 712; 50 U.S.C.A. App. 1171.

authority of said Act (S. R. 22), the Secretary of War determined to use the latter method, and on July 15, 1941, a contract was executed between the United States and Ford, Bacon & Davis, Inc. (S. R. 21-73). The precise question here is whether the Fair Labor Standards Act sets forth the standards by which employees at the plant were required to be paid.

Section 1(a)(1) of the Act of July 2, 1940,[9] authorizes the Secretary of War to provide for the construction of war plants. Subsection (2) authorizes him "to provide for the * * * manufacture * * * of munitions * * * at such places and under such conditions as he may deem necessary". Subsection (3) authorizes the making of contracts by the Secretary of War "as he may deem necessary to carry out the purposes specified". Subsection (b) authorizes the disposal of such plants "under such terms and conditions as he may deem advisable". Subsection (c) authorizes advance payments to contractors "upon such terms and conditions * * * as the Secretary of War shall prescribe". The Act contains a proviso that no contract entered into pursuant to the authority granted thereunder shall be exempt from the provisions of the Walsh-Healey Act[10] solely because of being entered into without advertising.

There can be no doubt that Congress could have authorized the Secretary of War to make contracts of the kind referred to in the Act of July 2, 1940, without complying with the Fair Labor Standards Act[11]; that is, Congress could have specified that salaries of employees engaged in the performance of such contracts should be determined without reference to the Fair Labor Standards Act. The question, therefore, is whether Congress did give the Secretary of War this authority.

We submit that the Court of Appeals was correct in holding that Congress did confer this authority on the Secretary of War and that the Fair Labor Standards Act has no application to installations such as the Arkansas Ordnance Plant. We believe it is clear that Congress had no

[9] 54 Stat. 712; 50 U.S.C.A. App. 1171.
[10] 49 Stat. 2036; 41 U.S.C.A. 35-45.
[11] 52 Stat. 1060; 29 U.S.C.A. 201-219.

intention of restricting the War Department in securing the supplies necessary to protect the nation in time of war.

The Secretary of War was authorized to make contracts "under such conditions as he may deem necessary". The only limitation was that with respect to the Walsh-Healey Act. Thus it is clear that the Congress considered labor relations. It did not deem it expedient to include the Fair Labor Standards Act in the limitation of authority and it is, therefore, reasonable to assume that Congress did not intend that the Fair Labor Standards Act should be controlling with respect to the wages and hours of employees at the plants mentioned in the Act.

Although it is unnecessary to decide the issue in this case, we submit that the statement of Circuit Judge Johnsen in his concurring opinion in the court below is unanswerable. We quote from the opinion (R. 27):

> "If a test of these powers should have arisen in a situation indicating the impossibility or impracticability in attempting to make prompt defense preparations, of having the wage scales and overtime rates fixed in these plants except by War Department action, I should doubt that any court would have difficulty in seeing in the nature and the language of the Act, as I have discussed them above, a reservoir of power in the Secretary of War so to act, independent of the wage and hour provisions of any other statute."

We respectfully submit that the Secretary of War, in operating the Arkansas Ordnance Plant in the manner in which it was operated, was acting within his authority and that the plaintiffs, as employees at the plant, can assert no rights under the Fair Labor Standards Act.

B. THE EMPLOYEES AT THE ARKANSAS ORDNANCE PLANT WERE NOT ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE.

Even though it be conceded that Congress did not, by the Act of July 2, 1940, remove Government-owned, contractor-operated war plants from the sphere of the Fair

Labor Standards Act, still that Act, by its terms, is not applicable to the Arkansas Ordnance Plant.

The overtime provisions of the Act (Sec. 7) apply only to employees "engaged in commerce or in the production of goods for commerce". The employees in this case do not allege that they were engaged in commerce; they state only that they were engaged in the production of goods for commerce.

The munitions upon which the employees worked were at all times the property of the United States (S. R. 14, 15, 63) and the United States shipped the completed items to military installations outside the State of Arkansas (S. R. 16). The question, simply stated, is whether a shipment by the United States in its sovereign capacity of its own property across state lines for defense of the nation in time of war constitutes commerce.

The proposition that such shipments are not commerce finds either direct or inferential support in decisions by the Supreme Court of Arkansas [12] and by the Courts of Appeal for the Second,[13] Fourth,[14] Fifth,[15] Sixth,[15a] Eighth,[16] Ninth,[17] and Tenth[18] Circuits.

The Court of Appeals for only one Circuit, the Seventh, has indicated a contrary opinion,[19] and since the opinion was based upon an independent ground, the remarks of the court concerning the commerce issue are dicta.

That the Government was the producer of the munitions is undisputed. Also undisputed is the fact that the

[12] H. B. Deal & Co., Inc. v. Leonard, 210 Ark. 512; 196 S. W. (2) 991 (1947).

[13] Divins v. Hazeltine Electronics Corp., 163 F. (2d) 100 (C.C.A. 2, 1947).

[14] Walling v. Haile Gold Mines, Inc., 136 F. (2) 102 (1943) when read in connection with Holland v. Haile Gold Mines, Inc., 44 F. Supp. 641 (1942).

[15] Kennedy v. Silas-Mason Co., 164 F. (2) 1016 (1947); Creel v. Lone Star Defense Corp., 171 F. (2) 964 (1949) cert. granted June 6, 1949.

[15a] Selby v. Jones Construction Company, F. (2) , C.C.H. 16 Labor Cases ¶ 65,177 (C.C.A. 6, May 27, 1949).

[16] Crabb v. Welden Brothers, 164 F. (2) 797 (C.C.A. 8, 1947).

[17] National Labor Relations Board v. Sunshine Mining Co., 110 F. (2) 780 (1940); Fox v. Summit King Mines, Ltd., 143 F. (2) 926 (1944); Ritch v. Puget Sound Bridge & Dredging Co., 156 F. (2) 334 (1946) when read in connection with the District Court opinion 60 F. Supp. 670. (1945).

[18] Clyde v. Broderick et al., 144 F. (2) 348 (1944) when read in connection with the District Court opinion 52 F. Supp. 553 (1943).

[19] Bell v. Porter, 159 F. (2) 117 (C.C.A. 7, 1946).

Government shipped the munitions. The Government was both consignor and consignee (S. R. 107, 109, 111). Was the Government engaged in commerce in making these shipments? We submit that decisions of this court make it clear that the Government was not engaged in commerce. Thus, in New York ex rel. Rogers v. Graves,[20] it was held that the Government, by shipping merchandise in the exercise of its sovereign functions, was not engaged in commerce even though incidental to such shipments, merchandise was commercially transported for others.

This court has further held that the Government, in the generation, sale and distribution of electricity, is not engaged in commerce.[21]

We respectfully submit that there is no real conflict in the decisions of the various Courts of Appeal on this issue, and that the issue has been determined correctly and in accord with prior decisions of this Court.

C. PLAINTIFFS WERE EMPLOYEES OF THE UNITED STATES.

The United States is not required to pay its employees in accordance with the Fair Labor Standards Act. This is expressly provided in the Act.[22]

Provisions in the contract designating Ford, Bacon & Davis, Inc., an independent contractor (S. R. 41) are not controlling. The real question is the actual relationship of the parties.[23]

The facts in the case amply justify the assertion that plaintiffs were employees of the Government. The Government recognized the unique relationship existing between it and the contractor (S. R. 163). Ford, Bacon & Davis, Inc., was merely a corporate manager of the plant for the Government. The Government, though utilizing the services of private managers, nevertheless retained ultimate control. It was for purposes of convenience that the

[20] 299 U. S. 401, 406; 81 L. Ed. 306, 309 (1937).
[21] Ashwander v. Tennessee Valley Authority, 297 U. S. 288; 80 L. Ed. 688 (1936).
[22] Sec. 3(d); 29 U.S.C.A. 203(d).
[23] Rutherford Food Corp. v. McComb, 331 U. S. 722, 729; 91 L. Ed. 1772, 1778 (1947); McComb v. McKay, 164 F. (2) 40 (C.C.A. 8, 1947).

plant was operated in the name of the contractor. This system of operation did not change the nature of plaintiffs' employment. The Government was still the boss, so to speak. Thus, it dictated the wage rates and required the contractor to comply therewith (S. R. 18). The extent of this supervision is illustrated by Exhibit 5 (S. R. 90-97) and Exhibit 6 (S. R. 97-101) to the Motion for Summary Judgment. The Government refused to permit an increase in janitors' wages of seven cents per hour, although the contractor was having difficulty in securing help at the pre-existing rates. If a purported independent contractor cannot hire a janitor or a laborer without specific approval of the principal, we submit that the contract creates an agency relationship and not an independent contractor relationship.

The Government maintained checkers in the clock houses where employees clocked in and out (S. R. 14); it audited and approved time cards (S. R. 14) and witnessed pay roll payments (S. R. 14). Exhibits D-3 (S. R. 159) and D-4 (S. R. 161) are photostats of typical time cards and indicate Government approval of the time recorded.

The Ordnance Safety Manual (S. R. 84-90) sets forth detailed instructions as to conduct of employees.

We believe that the opinion of this Court in United States v. United Mine Workers [24] is clearly in point. The Court said:

> "The defendants, however, point to the fact that the private managers of the mines have been retained by the Government in the role of operating managers with substantially the same functions and authority. * * * The regulations, however, also provide for the removal of such operating managers at the discretion of the Coal Mines Administrator. Thus the Government, though utilizing the services of the private managers, has nevertheless retained ultimate control." [25]

This Court, in National Labor Relations Board v. Atkins & Company,[26] held that the power to determine wages and hours of another coupled with the obligation to bear

[24] 330 U. S. 258; 91 L. Ed. 884 (1947).
[25] 330 U. S. 288; 91 L. Ed. 909-910.
[26] 331 U. S. 398; 91 L. Ed. 1563 (1947).

the financial burden of those wages was sufficient to establish the employer-employee relationship. The record in the case at bar not only discloses that these powers were vested in the Government but also all of the other common-law attributes of an employer.[26a]

The courts below would have been justified in basing the judgment on this one issue and, therefore, the writ should not be granted.

D. THE MATERIALS WORKED ON BY PLAINTIFFS WERE NOT "GOODS" AS DEFINED BY THE ACT.

Section 3(i) of the Act [27] in defining "goods" provides that the term "does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

We believe that this provision of the Act clearly excludes the material worked on by the plaintiffs. The Government was the ultimate consumer of the goods. The record clearly reflects that the Government had title to and possession of the materials at all times relevant hereto.

District Judge Lemley, who presided at the trial of this case, made a finding of fact in a similar case, as follows: [28]

> "The defendant at no time had title to the finished products of the plant, and at no time had title to any of the component parts of such products, or of the materials, supplies, machinery, equipment, or other property used in connection with the contract, title thereto and possession thereof being at all times in the United States and subject to its sole control."

[26a] Selby v. Jones Construction Company, ... F. (2) ..., C.C.H. 16 Labor Cases ¶ 65,177 (C.C.A. 6, May 27, 1949).

[27] 29 U.S.C.A. 203(i).

[28] Barksdale v. Ford, Bacon & Davis, Inc., 70 F. Supp. 690, 691 (see Finding of Fact No. 11).

The defense here asserted has been recognized and enforced in a number of cases.[29] It has been argued that the exclusion is not applicable because, if it be assumed that the munitions being produced had already been delivered into the possession of the United States, then the United States became a producer, manufacturer, or processor thereof. But if this be true, then the employees were employees of the United States and thus excluded under Section 3(i) of the Act.

E. PLAINTIFFS ARE BARRED BY THE PORTAL-TO-PORTAL ACT OF 1947.

The Portal-to-Portal Act of 1947[30] provides that an employer shall not be liable for failure to pay an employee overtime compensation for any activity except an activity which was compensable by express provision of contract or by custom or practice in effect at the time and at the place where the employee was employed.

It is clear from the complaint that plaintiffs seek to recover for activities of the character mentioned in the Portal-to-Portal Act. The affidavit of A. R. Clarke (S. R. 18) negatives the existence at the Arkansas Ordnance Plant of any contract, custom or practice which would support these claims. This affidavit is not controverted. The Response to Motion for Summary Judgment (Par. 6, R. 41) filed by plaintiffs specifically admits that there is no issue of fact on the effect of the Portal-to-Portal Act of 1947. It would seem to follow, therefore, that the dismissal of the complaint could be justified on this ground[31] as well as the

[29] Crabb v. Welden Bros., 164 F. (2) 797 (C.C.A. 8, 1947); Divins v. Hazeltine Electronic Corp., 163 F. (2) 100 (C.C.A. 2, 1947); Barksdale v. Ford, Bacon & Davis, Inc., 70 F. Supp. 690, 693 (E. D. Ark. 1947); Anderson v. Federal Cartridge Corp., 72 F. Supp. 644 (Minn. 1947); Kruger v. Los Angeles Shipbuilding and Drydock Corp., C.C.H. 12 Labor Cases ¶ 63,660 (S. D. Calif. 1947); Lynch v. Embry-Riddle Co., C.C.H. 10 Labor Cases ¶ 62,923 (S. D. Fla. 1945).

[30] Act of May 14, 1947, c. 52, 61 Stat. 84, 29 U.S.C.A. 251-268.

[31] Seese v. Bethlehem Steel Co., 168 F. (2) 58 (C.C.A. 4, 1948); Rogers Cartage Co. v. Reynolds, 166 F. (2) 317 (C.C.A. 6, 1948); Tucker v. Pratt & Whitney Aircraft Corp., 77 F. Supp. 227 (D. C. Mo. 1948); Grayzeski v. Federal Shipbuilding & Dry Dock Co., 76 F. Supp. 845 (D. C. N. J. 1948); Alameda v. Paraffin Cos., 75 F. Supp. 282 (D. C. Colo. 1947); Conwell v. Central Mo. Tel. Co., 74 F. Supp. 542 (D. C. Mo. 1947); Story v. Todd Houston Shipbuilding Corp., 72 F. Supp. 690 (D. C. Tex. 1947); Plummer v. Minneapolis-Moline Plow Co., 76 F. Supp. 745 (D. C. Minn. 1948); Sinclair v. U. S. Gypsum Co., 75 F. Supp. 439 (D. C. N. Y. 1948); Lasater v. Hercules Powder Co., 73 F. Supp. 264 (D. C. Tenn. 1947).

others hereinbefore mentioned and that certiorari should be denied.

CONCLUSION

Respondent is cognizant of the fact that this Court granted certiorari in a somewhat similar case [32] on June 6, 1949. We submit, however, that the record in the case at bar fully justifies the judgment in the lower courts; that said judgments may be sustained on each of the grounds mentioned herein, and are correct; that there is no real conflict between the various Circuits upon the ultimate result; that the judgment is in accord with decisions of this Court, and that the petition for a writ of certiorari should be denied.

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[32] Creel v. Lone Star Ordnance Plant, ... U. S. ..... (June 6, 1949).